

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN PARKEY)	
Claimant)	
VS.)	
)	Docket Nos. 205,297; 205,298;
)	& 205,299
WHELAN'S, INC.)	
Respondent)	
AND)	
)	
KANSAS BUILDING INDUSTRY WORKERS)	
COMPENSATION FUND)	
Insurance Fund)	

ORDER

Claimant appealed the August 15, 2000 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on February 15, 2001.

APPEARANCES

Dan E. Turner of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, the parties litigated these claims as if the June 1995 settlement entered into for the March 9, 1995 accident had been set aside. When the Judge took stipulations at the regular hearing, the parties agreed that respondent and its insurance fund would be entitled to a credit for any monies paid in that settlement.

ISSUES

Docket #205,297 was filed as a claim for December 8, 1994 back and bilateral lower extremity injuries from lifting boxes of cabinets. In the August 15, 2000 Award, the Judge denied benefits, finding that claimant had failed to serve timely written claim for benefits. The Judge also found that claimant fabricated the December 1994 incident and that claimant failed to prove that he sustained any back injury while working for respondent.

Docket #205,298 was filed as a claim for February 9, 1995 back and left knee injuries from stepping into a hole while carrying a door. In the Award, the Judge found that claimant sustained an accident as alleged and provided timely notice. But the Judge denied benefits in this claim, finding that all of the permanent impairment to claimant's left knee is attributable to the accident that is the subject of the claim in Docket #205,299.

Docket #205,299 was filed as a claim for March 9, 1995 back and left knee injuries from slipping on either water or ice and falling. The Judge denied permanent partial disability benefits, finding that claimant failed to prove the extent of functional impairment according to the appropriate version of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides).

Although requested, claimant's attorney neither filed a submission letter with the Judge nor a brief with the Board. Therefore, the Board is without the benefit of claimant's written arguments setting forth his contentions in these claims. But at oral argument before the Board, claimant's attorney announced he was abandoning the appeal in Docket #205,297. Moreover, at oral argument, the parties narrowed the issues in this appeal to those issues listed below. Claimant's attorney also announced that claimant was seeking permanent partial disability benefits based only upon the functional impairment ratings.

Docket #205,298

1. On February 9, 1995, did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
2. If so, did claimant provide respondent with timely notice of the accident or injury?
3. What is the nature and extent of injury and disability?
4. Is claimant entitled to receive medical benefits and temporary total disability benefits for this alleged injury?
5. Did the injury disable claimant for at least one week from earning full wages at the work at which he was employed as required by K.S.A. 44-501(c) (Furse 1993)?

Docket #205,299

6. What is the nature and extent of injury and disability?
7. Is claimant entitled to receive medical benefits and temporary total disability benefits for this alleged injury?
8. Did the injury disable claimant for at least one week from earning full wages at the work at which he was employed as required by K.S.A. 44-501(c) (Furse 1993)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

Docket #205,297

1. At oral argument to the Board, claimant's attorney announced he was abandoning the appeal in this claim. Therefore, the Board affirms the Award denying claimant benefits for the alleged December 1994 accident.

Docket #205,298

2. The Board affirms the Judge's denial of benefits in this claim. Claimant alleges that on February 9, 1995, he injured his left knee and reinjured his back when he stepped into a hole. The evidence fails to establish that claimant sustained any permanent injury or permanent aggravation as a result of that alleged accident and, likewise, fails to establish what medical treatment, if any, was provided to claimant as a result of that accident. Therefore, the request for benefits in this claim should be denied.

3. The other issues surrounding the February 9, 1995 claim are rendered moot.

Docket #205,299

4. On March 9, 1995, claimant slipped and fell at work and injured his left knee. On May 6, 1995, while undergoing treatment for the left knee from orthopedic surgeon Dr. Michael T. McCoy, claimant complained to the doctor of back and right leg pain. The doctor prescribed epidural steroid injections for claimant's back and referred him to Dr. Craig Yorke, a neurosurgeon, for further evaluation of the back.

5. Dr. McCoy determined that claimant had chondromalacia in the left knee. When asked at his first deposition whether the March 9, 1995 accident precipitated the left knee problem or aggravated claimant's back, the doctor stated that he had no opinion. But at his second deposition, the doctor stated that he believed the chondromalacia was either caused or aggravated by claimant's work-related accidents. But the doctor did not state which accident or accidents,¹ if any, caused permanent injury or impairment. Nor did the doctor determine what portion of claimant's ultimate permanent impairment was attributable to any specific accident.

¹ At page 5 of the first deposition taken of Dr. McCoy on September 6, 1996, the doctor testified that claimant provided a history that he had injured his left knee on three different occasions – February 9, March 9, and March 21, 1995. But the record fails to expound on the March 21, 1995 accident.

6. Dr. McCoy rated the impairment in claimant's left knee at 10 percent "permanent partial disability of the lower extremity."² But the doctor was not asked, and did not state, which edition of the *AMA Guides*, if any, was used to determine claimant's functional impairment. Therefore, the Board finds that claimant failed to prove that Dr. McCoy provided a functional impairment rating according to the revised third edition of the *AMA Guides*, as required by the Workers Compensation Act for a March 9, 1995 accident.

7. In July 1995, Dr. Yorke first saw claimant for his back and initially diagnosed a ruptured disk. Dr. Yorke treated claimant through October 31, 1995, and did not see him again until almost two years later on October 28, 1997. In the interim, in May 1996, claimant was severely injured in an automobile accident, which rendered him comatose for approximately 17 days. At the October 1997 visit, claimant complained bitterly of continuing pain in the right leg. An MRI showed evidence of nerve impingement by an overgrown ligament and bone between the fifth lumbar (L5) and first sacral (S1) vertebrae, a subtle slip of L5 forward on S1, and some bulging of the disk. A November 1997 EMG showed neurogenic abnormality consistent with mild right L5 radiculopathy. As a result, Dr. Yorke believed claimant had a far lateral disk herniation at L5-S1. But when the doctor operated on claimant's back in December 1997, Dr. Yorke could not find a herniated disk. Furthermore, the surgery confirmed the lateral recessed stenosis as the overgrowth of bone and ligament partially obstructed the opening through which the nerve root exited the spinal canal and entered the soft tissues around the spine.

8. Dr. Yorke testified that claimant had an 18 percent whole body functional impairment from the lateral recessed stenosis, a degenerative condition, which the doctor believed had several causes including everyday wear and tear, claimant's work-related injuries, the May 1996 automobile accident, and unknown causes. But the doctor was unable to apportion the contribution from any individual cause. Dr. Yorke testified, as follows:

. . . And I really can't quantify how much of each is at work in this particular case.³

. . .

I think that the motor vehicle accident contributed to the pathology that we ultimately dealt with in the operating room. The-- again, the degree of contribution I can't quantify.⁴

² Deposition of Dr. Michael T. McCoy, September 6, 1996; p. 22.

³ Deposition of Dr. Craig Yorke, June 3, 1998; p. 17.

⁴ Deposition of Dr. Craig Yorke, June 3, 1998; p. 20.

Based upon Dr. Yorke's testimony that claimant's work-related accidents contributed to the lateral recessed stenosis, plus the history that claimant provided to Dr. Yorke that he experienced increased back symptoms while participating in the physical therapy prescribed by Dr. McCoy for the left knee, the Board finds that the back treatment administered by Dr. Yorke from July through October 1995 was related to the March 9, 1995 work-related accident.

9. Dr. Yorke purportedly rated claimant using the third edition of the *AMA Guides*. But on cross-examination at his second deposition, which was taken in June 1998, it became apparent the doctor did not utilize the *Guides* in formulating his functional impairment opinion. The doctor testified:

I believe it was the Third Edition. I-- I don't use it in a compulsive way, though. I-- I use it as an aid, but really what I produce is an estimate based on my experience.

. . .

Well, I've rated people the same way ever since I entered practice in 1980. I understand that some changes have been made in the way these ratings are supposed to be done based on the Fourth Edition and based on going back and forth from tables and-- and really a lot more work than I'm used to doing, you know, for making these ratings. **And what I've told attorneys and what I'll tell you is that I've continued to rate people the same way.**⁵ (Emphasis added.)

Considering Dr. Yorke's entire testimony, the Board concludes that he did not rate claimant's functional impairment according to any edition of the *AMA Guides*.

10. The Judge appointed orthopedic surgeon Dr. John A. Lynch to evaluate claimant and provide a functional impairment rating. Dr. Lynch did not testify but his evaluation report is part of the evidentiary record.⁶ In addition to confusing the accident dates,⁷ the doctor wrote

⁵ Deposition of Dr. Craig Yorke, June 3, 1998; pp. 21, 22.

⁶ K.S.A. 44-510e(a) (Furse 1993).

⁷ In his June 9, 1999 report, on page two, Dr. Lynch outlines claimant's history and states that claimant had sustained three accidents -- December 8, 1994; February 9, 1995; and March 9, 1995. But on page five, Dr. Lynch summarizes his findings and states that claimant was injured in the fall of 1995 and later sustained both a left knee injury and in 1996 massive chest and head injuries.

that in rating claimant he used the fourth edition, rather than the revised third edition, of the *AMA Guides*.⁸

11. Claimant initiated a lawsuit for the May 1996 automobile accident alleging back injuries, among others. Considering the entire record, claimant has failed to prove that the medical treatment for the back commencing October 1997 is related to the March 9, 1995 accident at work.

12. Claimant alleges that he injured both his back and left leg in the February 9 and March 9, 1995 accidents. Because those injuries comprise an “unscheduled” injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e (Furse 1993). That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. **In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines [sic] for [sic] the Evaluation of Physical [sic] Impairment, if the impairment is contained therein.** An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

When considering all of the medical evidence presented, the Board finds and concludes that claimant has failed to prove that he sustained any permanent impairment or permanent injury in the March 9, 1995 accident. But, assuming *arguendo* that claimant did sustain either permanent impairment or permanent injury, the Board also concludes that claimant has failed to prove the extent of his functional impairment according to the revised third edition of the *AMA Guides* as required by the above-quoted statute. Therefore, the request for permanent partial general disability benefits should be denied.

⁸ This error is not uncommon but could be easily eliminated by the attorneys merely advising the doctors which edition of the *AMA Guides* they are to utilize in their ratings.

13. The Workers Compensation Act provides that preexisting conditions that are exacerbated by a work-related injury shall be compensated but that any such award must be reduced by the amount of preexisting functional impairment. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁹

The above language has been interpreted by the Court of Appeals, which has held that once a worker proves increased disability, the worker is entitled to the full amount of the disability less any amount of preexisting impairment established by the employer.¹⁰ But the Board finds and concludes that claimant has failed to prove that the March 9, 1995 accident permanently aggravated a preexisting condition or caused a permanent increase in disability. Therefore, any request for permanent partial disability benefits based upon an aggravation of a preexisting condition should also be denied.

14. For the date of accident involved in this claim, the Workers Compensation Act provides that an employer is not liable for permanent partial disability benefits for an injury that “does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.”¹¹

The Board finds that the March 9, 1995 accident disabled claimant for more than one week from the work at which he was employed. First, claimant testified that he was off work for approximately one week because of the March 9, 1995 accident. Second, following the March 9, 1995 accident and the arthroscopic surgery that Dr. McCoy performed on claimant’s left knee, claimant returned to work on light duty and performed accommodated work for more than a week. Either fact, standing alone, is sufficient to satisfy the requirement of K.S.A. 44-501(c) (Furse 1993).

15. Based upon the above, the Board finds and concludes that claimant has failed to prove that he is entitled to receive permanent partial general disability benefits for the March 9, 1995 accident. But claimant is entitled to receive the .43 weeks of temporary total disability benefits awarded by the Judge.

Claimant is entitled to receive payment of the authorized, reasonable and necessary medical treatment for the left knee, including that provided after the March 9, 1995 accident

⁹ K.S.A. 44-501(c) (Furse 1993).

¹⁰ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000).

¹¹ K.S.A. 44-501(c) (Furse 1993).

by Dr. McCoy and his referrals. Additionally, claimant is entitled to receive payment for the reasonable and necessary medical treatment for the back that was administered by Dr. Yorke from July through October 1995. But the record fails to establish that the back treatment administered by Dr. Yorke commencing in October 1997 was directly related to the March 9, 1995 accident and, therefore, that medical expense is denied. Claimant is entitled to receive unauthorized medical benefits up to the \$500 statutory maximum. Because claimant has failed to prove that the March 9, 1995 accident caused permanent injury or permanent impairment, future medical benefits are denied.

16. The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the August 15, 2000 Award and grants and denies those medical benefits as set forth above. The Board adopts the remaining orders as contained in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dan E. Turner, Topeka, Kansas
Matthew S. Crowley, Topeka, Kansas
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director